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Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

**CITY OF BURLINGTON,**

*Petitioner,*

v.

**DAGUE, et al.,**

*Respondents.*

**On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit**

**BRIEF OF THE LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW  
AND THE WOMEN'S LEGAL DEFENSE FUND  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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### **QUESTION PRESENTED**

Whether a court, in determining a reasonable attorney's fee award under one or more federal fee-shifting statutes, may enhance the fee award above the lodestar amount in order to reflect the fact that the attorney had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all.

(i)

**LIST OF PARTIES BELOW**

CITY OF BURLINGTON, Petitioner  
 ERNEST DAGUE, SR., ERNEST DAGUE, JR., BETTY DAGUE, AND ROSE A BESSETTE, Respondents

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1991

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No. 91-810

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CITY OF BURLINGTON,  
v.  
*Petitioner,*  
DAGUE, *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit

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BRIEF OF THE LAWYERS' COMMITTEE  
FOR CIVIL RIGHTS UNDER LAW  
AND THE WOMEN'S LEGAL DEFENSE FUND  
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar Association, at the request of President Kennedy, to provide legal representation to African Americans who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local affiliates have represented the interests of minorities and women in hundreds of class actions relating to employment and housing discrimination, voting rights, equalization of municipal services, and school desegregation.

The Women's Legal Defense Fund ("WLDF") is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex-discrimination cases, public education, and lobbying for improvements in the equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement.

Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in litigating cases arising, *inter alia*, under the Civil Rights Acts of 1866, 1877, and 1964, the Voting Rights Act, and the Fair Housing Act. Similarly, since its inception, the WLDF has relied almost exclusively on members of the private bar to litigate sex-discrimination cases, and lawyers representing clients in WLDF's sex-discrimination cases have brought scores of cases under Title VII. Pursuant to the terms of WLDF's tax exemption, these lawyers receive no compensation for their time except that provided pursuant to fee-shifting statutes, primarily Title VII of the Civil Rights Act of 1964.

These and numerous other federal statutes allow a prevailing plaintiff to recover reasonable attorney's fees. The purpose of these statutes is to attract lawyers to assist those with viable claims who could not otherwise afford legal counsel, by providing reasonable compensation. Indeed, it has been WLDF's experience that lawyers willing to litigate employment discrimination cases are scarce; without the strong incentives the fee-shifting statutes provide, many of those who would challenge discrimination would find it extremely difficult to secure legal representation. Thus, the interpretation of federal fee-shifting statutes is of critical importance to the vindication of civil rights through the federal courts—the goals of the Lawyers' Committee and the WLDF.

#### STATEMENT OF THE CASE

Respondents are owners of land adjacent to a landfill operated by petitioner City of Burlington, Vermont (the "City"). Respondents brought suit in federal district court against the City, alleging that the City was operating the landfill in violation of a variety of federal and state laws.

In April 1985, respondents retained William W. Pearson and other attorneys to represent them in their lawsuit against the City. The attorneys agreed to take the case with their fee totally contingent on winning. The contingency fee arrangement was used, in part, because respondents had no funds with which to pay for legal services. In addition, respondents would have faced extreme difficulty in finding an experienced counsel willing to represent them with the payment of any fee totally contingent on winning.<sup>1</sup>

Following a bench trial, the district court entered judgment for respondents on some, but not all, of their claims. Pet. App. 59-117a. The district court subsequently awarded attorney's fees to respondents pursuant to 42 U.S.C. § 6972 (e) (1988) and 33 U.S.C. § 1365(d) (1988)—the fee-shifting provisions of the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act, respectively. Pet. App. 130-34a.<sup>2</sup> The court awarded respondents their "lodestar" fee (\$198,027.50) and also added a 25% contingency enhancement (\$49,506.87), which was intended to compensate respondents' attorney for having assumed the risk that he would receive nothing had respondents not prevailed. The district court explained its

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<sup>1</sup> See Affidavits of Heather Briggs and William Pearson in Support of "Plaintiffs' Supplemental Application for Award of Fees and Costs," Civil Action No. 85-269, Appellate No. 90-7544, at 339-42 and 371-76 (filed June 25, 1991).

<sup>2</sup> The two provisions are identically worded and provide for an award of "reasonable attorney and expert witness fees" to any party, whenever appropriate.

decision to award a contingency enhancement by stating that respondents' "risk of not prevailing was substantial under the facts here" and that "absent an opportunity for enhancement, [respondents] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence in this complicated field of law." Pet. App. 132-33a.

The City appealed the entire judgment, including the award of attorney's fees and the risk enhancement, to the United States Court of Appeals for the Second Circuit. On June 12, 1991, the Second Circuit affirmed the decision of the district court in all respects. Pet. App. 1-37a. With respect to the contingency enhancement issue, the court below analyzed this Court's split, 4-1-4 decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), and concluded that none of the three opinions in that case was controlling as a matter of law. Pet. App. 36. Turning then to its own precedents, the Second Circuit stated that the critical inquiry was "whether '[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective access to the courts.'" Pet. App. 37a (quoting *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987) and *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)). Applying that standard, the appeals court upheld the district court's decision to award a 25% contingency enhancement. *Id.*

On November 18, 1991, the City filed its petition for a writ of certiorari, seeking review of all aspects of the Second Circuit's decision. The Court granted the petition, limiting the question to:

May a court, in determining a reasonable attorney's fee award under [the two environmental protection statutes], enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus

assuming the risk of receiving no attorney's fees at all?

*Burlington v. Dague*, 112 S. Ct. 964 (1992) (No. 91-810).

#### SUMMARY OF ARGUMENT

Five years ago in *Delaware Valley II*, a majority of the justices of this Court concluded that a risk enhancement may be awarded in appropriate circumstances. In recognition of that fact, all nine justices joined in one of three separate opinions, each of which attempted to articulate the circumstances when such awards are appropriate and how they should be calculated. The plurality opinion of four justices acknowledged that a majority of the justices would permit risk enhancement in appropriate cases; that plurality opinion, which would have denied such enhancements, also addressed the standards for such awards, stating that "enhancement for the risk of non-payment should be reserved for exceptional cases where the need and justification . . . are readily apparent and are supported by evidence in the record and specific findings by the courts." *Id.* at 728 (White, J., joined by Rehnquist, C.J., Powell, J., and Scalia, J.). Justice O'Connor, joining with the plurality to deny the requested enhancement in that case, nevertheless agreed with four dissenting justices that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions . . ." 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment). The four other justices, in dissent, plainly expressed the view that contingency enhancement is available in appropriate cases. *Id.* at 755 (Blackmun, J., dissenting, joined by Brennan, J., Marshall, J., and Stevens, J.).

The majority of this Court was correct in 1987, and the answer can be no different today: Congress recognized that a reasonable attorney's fee may often include a reasonable contingency enhancement. The purpose of

fee-shifting statutes is to attract sufficient competent counsel to take cases which Congress has determined vindicate important public or personal rights. The statutory standard of "a reasonable attorney's fee" means one sufficient to attract such counsel. This standard leaves courts with appropriate discretion to determine *what is reasonable* under the circumstances of a particular case. A lodestar fee calculated using a *reasonable* non-contingent hourly rate, for hours *reasonably* incurred, obviously includes two key elements of the reasonable overall attorney's fee. But in a case taken on a contingent fee basis—with a risk that the lawyer will receive a fractional fee or no fee at all in the even of an unsuccessful outcome—compensation for this risk of non-payment is also eminently reasonable.

Simply put, lawyers will normally be unwilling to accept cases which present the risk of no payment, for the same fee they would charge if payment is non-contingent. If the evidence establishes that an unenhanced lodestar fee based on the same hourly rate a lawyer charges for non-contingent cases is inadequate to attract sufficient competent counsel to take meritorious cases on a contingent fee basis, such a fee is *not* reasonable. Even petitioner appears to recognize this conclusion, through its repeated assertions that the risk of non-payment is properly to be encompassed within the setting of the hourly rate used to determine the lodestar fee amount. Pet. Br. at 9, 17-18. In this sense, petitioner and respondents differ chiefly as to the point in the overall mathematical formula at which risk enhancement is to be accomplished. What is agreed is that additional compensation for taking a case on a contingent fee basis, whether through an increased hourly rate or an overall contingency enhancement, is often necessary to make a fee reasonable.

While the fractured opinions in *Delaware Valley II* have led to some uncertainty in the lower federal courts as to how to calculate a contingency enhancement, courts across the Nation have been largely in agreement on one

empirical point. That point is that *in the marketplace* for legal services, litigating lawyers seek and obtain additional compensation (that is, above normal non-contingent rates time normal hours) for cases taken on a contingency basis. This is an established economic fact in areas of practice *not* implicated by federal fee-shifting statutes. Permitting risk enhancement under fee-shifting statutes simply affords an equal level of compensation that recognizes this economic fact. This Court has consistently looked to the marketplace for evidence of reasonableness in statutory attorney's fees, and the question of risk enhancement should be no different.

This Court should recognize this basic economic reality and re-affirm the availability of contingency enhancement when the market requires it as part of a reasonable attorney's fee. Only this conclusion will place such cases on an equal footing with other cases in the legal services marketplace, and fulfill the congressional purpose of ensuring that those persons with legitimate grievances but limited financial means have effective access to the courts for vindication of their rights.

## ARGUMENT

### I. FEDERAL FEE-SHIFTING STATUTES DO NOT FORECLOSE RISK ENHANCEMENTS IN APPROPRIATE CASES IN WHICH THE PREVAILING PARTY HAS BEEN REPRESENTED BY COUNSEL ON A CONTINGENT FEE BASIS

There is nothing in the enactment of the panoply of federal fee-shifting statutes to suggest a foreclosure of risk enhancement in appropriate cases. Certainly, nothing in the text of these statutes supports such a conclusion. Nor does anything in the actions of Congress leading up to the enactment of these laws even remotely suggest such a result. To the contrary, risk enhancement was considered by Congress and was effectively endorsed for statutory fee awards.

**A. The Legislative History Of The Civil Rights Attorney's Fees Award Act Of 1976 Reflects Congressional Endorsement Of Risk Enhancement As An Appropriate Consideration Under That And Similar Fee-Shifting Statutes**

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 ("Section 1988"), 42 U.S.C. § 1988 (1988), contains detailed congressional guidance on calculating reasonable attorney's fees, and it is persuasive authority for the interpretation of similarly-worded federal fee-shifting statutes.<sup>3</sup> In that legislative history, Congress stated that the case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), contained "appropriate standards" for determining a reasonable attorney's fee under federal fee-shifting statutes. See S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8 (1976). Among the twelve factors cited in *Johnson* for determining a reasonable attorney's fee is "whether the fee is fixed or contingent." 488 F.2d at 714-19 (factor number 6).

Moreover, as an example of a decision correctly applying the *Johnson* factors, Congress expressly cited the district court decision in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), aff'd, 550 F.2d 464 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 547 (1978), in which the district court concluded that it "must increase the [lodestar amount] . . . to reflect the fact that the attorneys' compensation, at least in part, was contingent in nature." *Id.* at 686. Thus, the legislative history

<sup>3</sup> See, e.g., *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986) ("Delaware Valley I"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. at 737 (dissent); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 611-12 (1st Cir. 1985); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 762 F.2d 272, 275 (3d Cir. 1985), modified, 478 U.S. 546 1019 (1986), rev'd, 483 U.S. 711 (1987). Accord Pet. Brief at 11; Brief for the United States as Amicus Curiae Supporting Petitioner ("U.S. Br.") at 6.

of Section 1988 strongly suggests that Congress intended contingency enhancement to be a proper consideration in arriving at a "reasonable" attorney's fee in cases involving that and similar fee-shifting statutes.

**B. In Complex Litigation Cases Prior To 1976, Federal Courts Frequently Allowed Risk Enhancement, And Such Cases Have Been Referenced With Approval By Congress**

Congress also stated in the legislative history of Section 1988 that attorney's fees should be equivalent to those awarded "in other types of equally complex Federal litigation, such as antitrust cases. . . ." S. Rep. No. 1011 at 6, reprinted in 1976 U.S.C.C.A.N. at 5913. A review of such cases is instructive on the issue of risk enhancement.

In antitrust fee-shifting cases decided prior to the enactment of Section 1988, federal courts awarding attorney's fees frequently permitted an upward adjustment in the fee to compensate for the contingency of payment.<sup>4</sup> Similarly, in other types of complex federal litigation where fee-shifting is permitted, federal courts, in decisions dating as early as 1931, frequently took account of the contingency of payment in determining a reasonable fee.<sup>5</sup> As this long line of cases indicates, "[t]he con-

<sup>4</sup> See, e.g., *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (1973), aff'd in part and vacated in part, 540 F.2d 102 (3d Cir. 1976); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976); *Arenson v. Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974).

<sup>5</sup> See, e.g., *National Treasury Employees Union v. Nixon*, 521 F.2d 317, 322 (D.C. Cir. 1975) (labor law class action); *Peter v. UMW Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1290 (D.C. Cir. 1975) (en banc) (labor law class action); *Green v. Transitron Elec. Corp.*, 326 F.2d 492, 496 (1st Cir. 1964) (securities class action); *Angoff v. Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959) (securities class action); *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931) (bankruptcy).

cept of enhancing a court awarded fee to reflect contingency stems from the earliest days of court awarded attorney fees in federal courts . . . ."<sup>6</sup> In fact, this is precisely what Congress was referring to when it mentioned complex federal litigation in the legislative history of Section 1988.

Congress' approving reference to antitrust and complex litigation cases in the legislative history of Section 1988 is thus further evidence of its acceptance of risk enhancement as a consideration in determining reasonable attorney's fees under federal fee-shifting statutes. The empirical evidence across the Nation, as found by federal district courts, is that the legal services marketplace does in fact compensate lawyers who have taken antitrust and other cases on a contingency basis, and have prevailed, at more than their normal hourly rates.<sup>7</sup>

<sup>6</sup> 2 Mary F. Derfner & Arthur D. Wolf, *Court Awarded Attorney Fees* ¶ 16.04[4], at 16-154 (1991) (citations omitted) ("Derfner & Wolf").

<sup>7</sup> For instance, in *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc), *petition for cert. pending*, 60 U.S.L.W. 3615 (U.S. filed Feb. 21, 1992) (No. 91-1370), there were a number of affidavits introduced on this point. The joint appendix in that case (cited below as "King Rec.") has been lodged with this Court in connection with the petition for certiorari. Each of the relevant *King* affidavits shows that the lawyer and his or her firm accept contingent fee cases only if there is a reasonable prospect of at least doubling their standard hourly fees in the event of a successful outcome: King Rec. 82-83 (Decl. of Nora Bailey: tax disputes; multiple of two or three); King Rec. 133 (Decl. of John Clifford: general practice including employment and personal injury cases; accepts contingency case only when there is a prospect of recovering triple the normal fees, if successful); King Rec. 146-49 (Decl. of Vincent Curtis, Jr.: comparative license proceedings before the FCC); King Rec. 165-66 (Decl. of Steven Engleberg: civil litigation including personal injury, commercial, and malpractice cases); King Rec. 191-92 (Decl. of Peter Kadzik: various types of complex federal litigation); King Rec. 193-200 (Decl. of Chester Kamin: partial contingent fee arrangement in antitrust case); King Rec. 276-77 (Decl. of Arnold Spevak: represent of tenant associations in condominium conver-

Continued availability of risk enhancement under federal fee-shifting statutes would merely treat cases under those statutes as the marketplace already treats other, comparable cases. Clearly, Congress wanted attorneys to be compensated on the same basis as in other contingency cases.

**C. In Cases After 1976, Federal Courts Have Often Continued To Allow Risk Enhancement, And Congress Has Never Attempted To Overrule Such Cases In Any Fee-Shifting Legislation Enhanced During This Time Period**

Contingency enhancement of the lodestar under federal fee-shifting statutes has continued to be widely accepted by federal courts in the years since the Civil Rights Attorney's Fees Awards Act was passed.<sup>8</sup> Over those same years, Congress has also continued to enact a variety of fee-shifting statutes on various subjects.<sup>9</sup> In all of this

sions, and representation of a commercial client in contesting a local tax assessment); King Rec. 296-98 (Decl. of Robert Weinberg: firm's contingent practice in tort cases); King Rec. 300-01 (Decl. of Kirkwood White: rezoning cases); King Rec. 303-06 (Decl. of Henry Zapruder: tax disputes and litigation).

<sup>8</sup> See, e.g., *Delaware Valley II*, 483 U.S. at 741 n.6 (Blackmun, J., dissenting). See also 2 *Derfner & Wolf*, *supra*, at 16-156, noting that "the federal courts have been unanimous in awarding increased fees or in holding that the fee for contingent litigation may be increased to account for the risk that counsel will recover no fee at all." As support for the above statement, Derfner & Wolf cite nearly twenty post-1976 cases covering all of the federal circuits. *Id.* n.162. But see *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *petition for cert. pending*, 60 U.S.L.W. 3615 (filed Feb. 21, 1992) (No. 91-1370).

<sup>9</sup> Presently, there are attorney fee provisions covering over 200 separate causes of action in the United States Code, and over two-thirds of those federal attorney fee provisions fall into the fee-shifting category. Furthermore, since 1964, the number of fee-shifting statutes in the United States Code has more than doubled. See 1 *Derfner & Wolf*, *supra*, ¶ 5.01[1], at 5-3, 5-6, 5-19 (1985). Many of these fee-shifting statutes were passed after the enactment of Section 1988 by Congress in 1976. See, e.g., National Co-

legislative activity, it is remarkable that in not one of its post-1976 fee-shifting statutes has Congress ever prohibited risk-based enhancement, nor has Congress, in the legislative history of those same fee-shifting statutes, ever commented with disfavor on any of the numerous federal cases in which contingency enhancement was allowed. If Congress had wished to foreclose the use of contingency enhancement as an appropriate factor in court-awarded attorney's fees, it could have (and no doubt would have) done so. This could easily have been accomplished either by direct language in the fee-shifting statutes themselves<sup>10</sup> or by an appropriate comment in the legislative history of the statutes.<sup>11</sup> That Congress has not precluded the widespread practice of risk-based enhancement in any of the many post-1976 fee-shifting statutes is once again strong evidence of its acceptance of contingency enhancement as an appropriate factor in arriving at a reasonable attorney's fee. In sum, petitioner is now asking this Court to shut a door that Congress chose to leave open.

**D. This Court Has Already Recognized That Congress Has Not Foreclosed Contingency Enhancement**

Amici are far from the first to conclude that Congress has not precluded consideration of risk enhancement in appropriate fee-shifting cases. Indeed, this Court has it-

operative Research Act of 1984, 15 U.S.C. § 4303(a)(1) (1988); Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. § 6104(e)(1) (1988).

<sup>10</sup> When it wants to, Congress knows how to limit fee awards, as in a per hour dollar limit. *See* Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1988) (in suits against United States, "attorney fees shall not be awarded in excess of \$75 per hour").

<sup>11</sup> *See, e.g.*, S. Rep. No. 1011 at 4, *reprinted in* 1976 U.S.C.C.A.N. at 5911-12, in which Congress specifically noted that its enactment of the Civil Rights Attorney's Fees Award Act of 1976 was "an appropriate response to the *Alyeska* decision," which created "anomalous gaps" in the provision of attorney's fees in civil rights cases. Congress was referring to the case of *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

self reached this conclusion. In *Delaware Valley II*, Justice O'Connor specifically concluded that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions . . ." 483 U.S. at 731. The plurality opinion acknowledged the existence of a majority in favor of risk enhancement by commenting on the circumstances under which it should be permitted. *Id.* at 728.<sup>12</sup> Although Justice O'Connor was writing for herself, the dissenting opinion of Justice Blackmun, which was joined by three other justices, specifically embraced Justice O'Connor's conclusion that risk enhancement had not been foreclosed by Congress.<sup>13</sup>

Thus, a clear majority of this Court has already acknowledged that Congress has never foreclosed consideration of contingency enhancement in an appropriate case. There is no reason for this fundamental conclusion to be reversed five years later.<sup>14</sup> The lower federal courts have had some difficulty in applying the 4-1-4 decision in *Delaware Valley II*, but they have not found fault with the principle that risk enhancement should be available in

<sup>12</sup> The dissent also recognized that the plurality opinion was not inconsistent with such a conclusion. In addition to embracing Justice O'Connor's conclusion, the dissent noted that the "plurality also recognizes, after a fashion, that fee-shifting statutes might be 'construed to permit supplementing the lodestar in appropriate cases by paying counsel for assuming the risk of nonpayment.'" *Id.* at 735 n.1.

<sup>13</sup> *Id.* at 735 n.1 (citing with approval Justice O'Connor's recognition that "Congress did not intend to foreclose enhancements for contingency in the setting of reasonable attorney's fees.")

<sup>14</sup> The doctrine of *stare decisis* is especially applicable in cases involving the interpretation of statutory law. *See, e.g.*, *Patterson v. United States*, 359 U.S. 495, 496 (1959); *United States v. South Buffalo Ry.*, 333 U.S. 771, 774-75 (1948) ("[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.").

some cases. To the contrary, in the wake of *Delaware Valley II* all circuits had granted risk enhancements in appropriate cases.<sup>15</sup> These same circuits had also rejected

<sup>15</sup> After having concluded in several previous opinions that contingency enhancements were available in appropriate cases under the standards announced by Justice O'Connor, in *King v. Palmer*, the D.C. Circuit reversed direction and concluded, contrary to the views of every other circuit, that contingency enhancements are never permitted. *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc), *petition for cert. pending*, 60 U.S.L.W. 3615 (U.S. filed Feb. 21, 1992) (No. 91-1370). In numerical order, the other circuit's decisions approving contingency enhancements are: *Jacobs v. Mancuso*, 825 F.2d 559, 561 (1st Cir. 1987) (disallowing contingency, not because of *per se* rule, but because "liability here was so plain . . . that, as a practical matter, the risk of not recovering a fee was all but eliminated") (citation omitted); *Dague v. Burlington*, 935 F.2d 1343, 1360 (2d Cir. 1991), *cert. granted in part*, 112 S. Ct. 964 (1992); *Kelly v. Matlack, Inc.*, 903 F.2d 978, 986-87 (3d Cir. 1990) (mandatory prerequisite to award of an enhancement is that plaintiff "establish that without adjustment it would have faced substantial difficulties in finding counsel in the . . . relevant market") (citations omitted); *Craig v. Department of Health & Human Servs.*, 864 F.2d 324, 328 (4th Cir. 1989) (dicta); *Alberti v. Klevenhagen*, 896 F.2d 927, 935-36 (5th Cir.) (enhancement available when district court "make[s] the findings required by Justice O'Connor's concurrence in *Delaware Valley II*" which is considered "the authoritative pronouncement of the Court"), *modified*, 903 F.2d 352 (5th Cir. 1990), *cert. granted in part*, 112 S. Ct. 964 (1992); *Perotti v. Seiter*, 935 F.2d 761, 765 (6th Cir. 1991); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 553 (7th Cir. 1991); *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 ("Justice O'Connor's opinion in *Delaware Valley II* is the current legal standard for awarding contingency enhancements."), *opinion withdrawn and substituted*, 952 F.2d 200 (8th Cir. 1991); *Bouman v. Block*, 940 F.2d 1211, 1235-36 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 640 (1991) (upholding fee on the basis of district court's findings matching Justice O'Connor's test); *Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990); *Martin v. University of South Alabama*, 911 F.2d 604, 612 (11th Cir. 1990); *Crumbaker v. Merit Sys. Protection Bd.*, 827 F.2d 761 (Fed. Cir. 1987) ("the Board on remand shall consider the degree to which the relevant market compensates for contingency and whether any enhancement is necessary

contingency enhancement when the trial court concluded that plaintiff had not made the necessary market showing, usually under Justice O'Connor's standard. When risk enhancements were awarded, they were based largely on the large and accumulating body of evidence, and trial court findings, that risk enhancement is necessary in many parts of the country to attract competent counsel to take congressionally-identified classes of cases on a contingent fee basis.

## II. A "REASONABLE ATTORNEY'S FEE" OFTEN REQUIRES A RISK ENHANCEMENT FOR A CASE TAKEN BY A LAWYER ON A CONTINGENT FEE BASIS

In light of Congress' clear indication that compensation in fee-shifting cases should be equal to other types of cases, the question then becomes a relatively simple and practical one. Under statutes providing for the award of "a reasonable attorney's fee" to a prevailing party, the issue is whether it is *reasonable* to permit risk enhancement when the case has been taken on a contingent fee basis. Or conversely, the question is whether it is reasonable to expect what one esteemed trial judge observed years ago that "[n]o one expects"—that "a lawyer whose compensation is contingent upon his success [should] charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."<sup>16</sup>

Amici submit that under the statutory standard of a "reasonable attorney's fee," it is inconceivable that risk

to bring the fee within a range that would attract competent counsel").

<sup>16</sup> *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963) (Wyzanski, J.) (emphasis added), *modified and aff'd sub nom. Gree v. Transitron Elec. Corp.*, 326 F.2d 492 (1st Cir. 1964).

enhancement can never be available—regardless of the prevailing market conditions and the substantial difficulties that could confront impecunious plaintiffs with meritorious claims seeking to retain competent counsel. An absolute prohibition of risk enhancement is simply not reasonable as applied to a number of possible situations. If, for instance, the relevant market were to place such a premium on the risk of non-payment that it would be impossible for deserving plaintiffs to find lawyers absent the prospect of risk enhancement, then some such enhancement would plainly be required by statute. In addition, cases of substantial difficulty in the absence of risk enhancement should also qualify under the statutory standard of a “reasonable attorney’s fee.”

**A. Empirical Evidence Of Markets For Legal Services Demonstrates That The Availability Of Risk Enhancement In Appropriate Cases Is Often One Element Of A “Reasonable Attorney’s Fee”**

Whether viewed as a matter of economics or one of common sense, it seems obvious that risk enhancement is entirely reasonable in order to place contingent fee cases on an equal footing with those cases in which the plaintiff has agreed to pay his or her lawyer, win-or-lose. Even those amici in favor of reversal have conceded that:

Free legal services [those provided on a contingent fee basis] confer a substantial benefit on a client. In exchange for that benefit, it is reasonable for the attorney to charge a fee to a client, if the case is won, that is greater than the fee a fee-paying client would be charged for the time expended.<sup>17</sup>

Indeed, petitioner itself concedes the fundamental reasonableness of risk enhancement, arguing that the risk of non-payment is properly to be subsumed within the setting of the hourly rate used to generate the lodestar fee

<sup>17</sup> Brief of Amici Curiae, The District of Columbia and Several of the States, In Support of Reversal (“D.C. Br.”) at 11.

amount.<sup>18</sup> Pet. Br. at 9, 17-18. This is an unconventional ordering of the mathematical formula for determining the “reasonable attorney’s fee,” but the end result of such an approach would be perfectly consistent with risk enhancement as it has been applied by the lower federal courts following *Delaware Valley II*. Whether taken into account at the beginning or the end of the process, the risk of non-payment in a contingent fee case calls for enhancement of the lodestar fee amount when the market requires such enhancement in order to arrive at a reasonable fee.

This Court need not rely, however, on logic or intuition alone. There is a wealth of economic evidence available that in a number of legal services markets across the Nation, risk enhancement is commonplace. Furthermore, this extensive and uncontradicted body of evidence relates not only to practice in fields covered by fee-shifting statutes, but also to practice in other, comparable areas of complex federal litigation.<sup>19</sup>

The case of *King v. Palmer*, an employment discrimination case arising in the District of Columbia market, is illustrative. In that case, the prevailing plaintiff introduced scores of affidavits on the risk enhancement issue from many different sources, including: (1) counsel in the underlying case; (2) other lawyers, specifically regarding the case; (3) local Title VII and employment law lawyers in private practice; (4) lawyers who practice in other areas of complex federal litigation in the District of Columbia, sometimes on a contingent fee basis; (5)

<sup>18</sup> There is absolutely no evidence that normal hourly rates include a factor for the risk of nonpayment for losing cases. In fact, the unrebutted evidence in many cases establishes that normal hourly rates are based exclusively on the notion that they are non-contingent with no factor for the risk of nonpayment because of unsuccessful litigation.

<sup>19</sup> Thus, contrary to the concerns of some, this evidence is not merely demonstrative of judicial fee-shifting determinations driving the marketplace, instead of vice versa. See U.S. Br. at 19-21; D.C. Br. at 5, 24 (citation omitted).

lawyers from civil rights organizations; (6) *pro se* plaintiffs in similar cases, who were turned down in seeking competent counsel on a contingency basis; and (7) a representative of the bar lawyer referral service. The affiants represented the billing practices of more than 500 lawyers from almost every facet of the local legal practice—large firms, solo practitioners, partners, associates, and public interest practitioners—and a significant part of the entire District of Columbia bar.

Furthermore, those affidavits contained exactly the type of market-oriented, empirical evidence that Justice O'Connor's test in *Delaware Valley II* requires to make an accurate determination. All of the evidence in *King v. Palmer* showed that lawyers who took contingent fee cases in the District of Columbia during the relevant time frame required at least 100 percent risk enhancement as an inducement to do so. This was demonstrated to be true both of employment law litigators<sup>20</sup> and of lawyers who handle other types of complex federal litigation not reached by fee-shifting statutes.<sup>21</sup> This evidence led to the D.C. Circuit's panel decision in favor of risk enhancement of 100 percent in that case, a decision that was subsequently overturned only by the legal conclusion of that court *en banc* that contingency enhancement is *never* available, as a matter of law, *King v. Palmer*, 906 F.2d 762 (1990), *vacated and reversed en banc*, 950 F.2d 771 (D.C. Cir. 1991), *petition for cert. pending*, 60 U.S.L.W. 3615 (U.S. filed Feb. 21, 1992) (No. 91-1370). Under *King*, even if the parties had stipulated or the trial court had found that *no lawyers* would take meritorious cases on a contingent fee basis without the possibility of an

<sup>20</sup> See King Rec. 92-93 (Decl. of Joel Bennett); King Rec. 168-69 (Decl. of John Erickson: at least 100 percent enhancement); King. Rec. 266 (Decl. of Gary Simpson: would accept a discrimination case on a contingent basis only with a 100 percent contingency bonus).

<sup>21</sup> See *supra* at 10-11, note 7.

enhancement if successful, no contingency enhancement could be awarded.<sup>22</sup>

Notably, market-based evidence comparable to that in the District of Columbia has been brought forward elsewhere as well. *See, e.g., Bouman v. Block, supra*, 940 F.2d at 1236 (9th Cir. 1991) (Los Angeles: remanding for determination of multiplier between 1.3 and 2.0); *Lattimore v. Oman Constr.*, 868 F.2d 437, 439 (11th Cir.), *reh'g denied en banc*, 875 F.2d 874 (11th Cir. 1989) (Alabama: 100% risk enhancement); *Fadhl v. City and County of San Francisco*, 859 F.2d 649, 650-51 (9th Cir. 1988) (San Francisco: multiplier of 2.0).

In contrast to the hard evidence available favoring the availability of contingency enhancement, petitioner and amici arguing in petitioner's support rely only on bald factual assertions. For instance, they proclaim that:

- “Compensation at a reasonable hourly rate for all hours worked will be sufficient to attract competent counsel.” Pet. Br. at 18-19.
- “A contingency enhancement over the lodestar is not necessary to enable plaintiff with a case involving a fair chance of success to obtain competent counsel.” U.S. Br. at 17.
- “There is no shortage of lawyers willing to take their cases on a non-fee-paying basis.” Brief of the Washington Legal Foundation and the Allied Education Foundation as *Amici Curiae In Support of Petitioner* (“WLF Br.”) at 17.

Tellingly, *none of these contentions is accompanied by any factual support*—either from the record below or from

<sup>22</sup> Even if the trial court made a factual finding based on uncontradicted evidence from the local market that lawyers *universally* charge higher hourly rates for contingent cases (*i.e.* an enhancement) than for cases in which payment is certain, *King* holds that contingency enhancements under statutes which require award of “reasonable attorney's fees” are barred as a *matter of law*—concluding that regardless of the facts, a risk enhancement can never be reasonable.

elsewhere. Indeed, the *only* factual references contained in petitioner's entire brief are two strained criticisms of the affidavits filed below by respondents. Pet. Br. at 22-23 n.3. The Brief for the United States is *entirely devoid* of any empirical evidence. This should not be surprising, for the available evidence thoroughly contradicts these hypotheses. The factual showings made in cases such as *King v. Palmer* are unrebutted as to the need for risk enhancement as an inducement to competent lawyers to take many cases on a contingent fee basis. In fact, in the instant case, in *King v. Palmer*, and in virtually every other reported case, the losing defendant has been unable to identify even a single lawyer, much less a pool of competent attorneys, willing to take such cases solely on a contingent lodestar fee basis with no possibility of risk enhancement.

Having no evidence of their own upon which to draw, petitioner and its supporters resort to wholesale attack on the large body of evidence regarding the need for contingency enhancement in many cases. Affidavits of practicing lawyers, the evidentiary staple of all other aspects of attorney's fees litigation, are scorned as inherently unreliable. For instance, amici maintain that affidavits submitted in risk enhancement cases "should be viewed with an extremely critical eye."<sup>23</sup> In effect, the critics of these affidavits invite this Court to make an across-the-board credibility determination, reversing the factual findings of dozens of federal trial courts—and to do so with no explanation of what other evidence might be more suitable or persuasive.

Yet evidence of the case intake and billing practices of litigating lawyers is absolutely essential to what is "reasonable" in the way of risk enhancement under the many fee-shifting statutes that adopt the reasonableness stand-

<sup>23</sup> WLF Br. at 13. The District of Columbia asserts flatly that attorney affidavits "are anecdotal in content and self-interested in motivation." D.C. Br. at 17.

ard. When the working of the financial services marketplace is at issue, it is logical to look in large part to financial institutions for evidence of their economic behavior. When agricultural markets are at issue, it is sensible to look to farmers for such evidence. There is no reason it should be any different for legal services and lawyers. Trial judges are perfectly capable of assessing the credibility and weight of attorney affidavits in this area, just as they handle a multitude of other types of economic evidence.<sup>24</sup>

In truth, what petitioner and its supporters resist is less the form of the evidence than the *empirical conclusion* dictated by it. Based on the evidence taken from various legal services markets across the country, many trial courts have reached a common factual conclusion, which has been affirmed by almost all of the courts of appeals. That inescapable fact is that the prospect of significant risk enhancement is often necessary as an inducement to lawyers to take on cases on a contingent fee basis. The marketplace is the most reliable benchmark of reasonableness, and should be the primary source of guidance in determining the availability and magnitude of contingency enhancements. A market-oriented approach permits judges to make their decisions on risk enhancement based on the economic evidence available, rather than requiring them to substitute their own values for the private valuations that markets exist to balance out. For other issues arising under fee-shifting statutes, a market-oriented approach has predominated. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 895-96 (1984) (reasonable hourly rate is the prevailing market rate in the relevant legal

<sup>24</sup> Perhaps respondents would prefer to place on prevailing plaintiffs the burden of producing formal econometric studies of the marketplace for legal services. But the empirical data for such studies would still come largely from lawyers. In addition, there is no reason to go to such lengths and expense. As this Court has held, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

community); *Hensley v. Eckerhart*, 461 U.S. at 437 (number of hours reasonably expended determinable by reference to "billing judgment" common in private practice). The market is equally trustworthy with respect to risk enhancement.

**B. None Of The Policy Arguments Leveled Against Risk Enhancement Is Of Any Force To Rebut The Congressional Mandate For The Award Of "Reasonable Attorney's Fees"**

Petitioner and its supporting amici raise a number of policy arguments against the availability of risk enhancement under any circumstances. None of these contentions is well grounded, and certainly none of them is of sufficient weight to override the congressional mandate for the awarding of "reasonable attorney's fees" to prevailing plaintiffs in statutorily selected cases.

The first policy argument is that risk enhancement compensates "persons who were not 'prevailing' parties."<sup>25</sup> The theory underlying this argument appears to be that contingency enhancement is not truly compensation for the case at hand, but compensation for other cases (unidentified) which may already have been lost. U.S. Br. at 14. But this is all legerdemain. No one is asking that anyone but "prevailing plaintiffs" be entitled to any attorney's fees awards under fee-shifting statutes, let alone enhancement of such awards. Moreover, the availability of fee enhancement for the risk of non-payment does not depend under existing law, and would not depend on whether the plaintiff has ever been involved in other cases, winning or losing. The connection to actual losing cases is only hypothetical. Nor does or would risk enhancement depend on the prior involvement of the prevailing plaintiff's lawyer in lost cases—risk enhancement could

<sup>25</sup> U.S. Br. at 13 (removing initial capitalization from argument heading); *see also* Pet. Br. at 10 ("results in paying plaintiff's counsel for losing efforts"); D.C. Br. at 8 (risk enhancement as "a defense-paid subsidy for unsuccessful litigation").

and should be available for a lawyer's first case, if otherwise appropriate. Properly understood, the purpose of risk enhancement is not to create a form of back-door compensation for other, undeserving efforts—it is to compensate for the risk that the *instant* case might have been lost and no fee paid to the lawyer.

The second policy argument is that contingency enhancement is improper because it inevitably compensates the prevailing plaintiff for the risk of winning or losing the individual case: "'if the courts cannot . . . directly [consider the risks undertaken by an individual fee applicant], how can it be appropriate to do so vicariously through the eyes of lawyers who declined the case.'"<sup>26</sup> This contention, however, misses the key point of Justice O'Connor's pivotal concurrence in *Delaware Valley II*: that risk enhancement should be "based on the difference in market treatment of [contingency] cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case." 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment).<sup>27</sup> There is a substantial difference between a trial court taking it upon itself to determine the risks of a particular case, especially *ex post facto*, and that same trial court weighing evidence of how the market evaluates the risk of non-payment in certain types of cases. Case-by-case review would be far more burdensome, far less reliable, and far more open to subjectivity on the part of the trial judge. Review of *market* evidence obviates the need for the trial judge to engage in such a particularized evaluation. Under Justice O'Connor's approach, the market is looked to—as it should be—as the process for the filtering and balancing of interests and demands of various parties. Market-oriented analysis, regarding contingent fee practice both under fee-shifting statutes and in other areas where such statutes do not apply, provides an objective

<sup>26</sup> WLF Br. at 14 (quoting *King v. Palmer*, 950 F.2d 771, 780 (1991); *see also id.* at 8-9; U.S. Br. at 22.

<sup>27</sup> *See also id.* at 730-31 (plurality opinion); *id.* at 745-46 (dissent).

basis for reasonable and consistent determinations of risk enhancement.

Last, it is contended that "there is no middle ground between routinely awarding contingency enhancements or not awarding them at all." WLF Br. at 16-17. If this were true, there would be a far greater regularity of risk enhancement than has been experienced to date. A number of courts have either declined to award risk enhancement or have awarded relatively minimal percentages of risk enhancement. Variations between different markets for legal services—in geography, in classes of cases, and in time—have proven to be significant. The lower courts remain free at all times to take such market differences into account, and to rule accordingly based on the evidence presented. The frequency and magnitude of risk enhancement will ultimately depend upon the evolution of legal services marketplaces and on the evidence presented in specific cases.<sup>28</sup>

If, over time, the prevailing circumstance emerges across the nation that competent attorneys are willing to take on cases on a contingent fee basis and without the prospect of risk enhancement, and this can be proven in court, then risk enhancement will gradually be rendered obsolete. But, in fact, the trend has been exactly in the opposite direction. For instance, the record in *King v. Palmer* is replete with evidence establishing that the number of attorneys willing to accept contingent Title VII cases has diminished greatly. No one would welcome more than

<sup>28</sup> It is conceivable, too, that market practice could evolve so as to build a risk enhancement factor into the hourly rate only for those cases taken on a contingent fee, with that hourly rate then used to set the "lodestar" fee amount without need for further risk enhancement. But that is certainly not the current practice. Furthermore, there is absolutely no evidence that lawyers' normal hourly rates, set for clients who pay win-or-lose, contain any imbedded factor for contingency enhancement. Neither such clients, nor defendants in fee-shifting cases litigated on a non-contingent fee basis, would tolerate the use of such increased rates for their cases, in which there is no risk of non-payment based on adverse outcomes.

amici the day when all plaintiffs with legitimate grievances are readily able to locate lawyers willing to take their cases to court. This Court, however, should not ignore the current state of affairs and anticipate such a day. Risk enhancement must continue to be available when the market requires such enhancement as part of a reasonable attorney's fee.

#### CONCLUSION

For the foregoing reasons, the Court should reaffirm the availability of risk enhancement for certain attorney's fees awards under federal fee-shifting statutes, and should affirm the decision and order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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